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Supreme Court U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JAMES T. WALKER
Petitioner,

v.

THE INSTITUTE FOR ECONOMETRIC RESEARCH.

On Petition for Writ of Certiorari
To The Court of Appeals for the
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

1. Whether or not a variety of prejudices - though perfectly understandable ones - have played a role in the outcome of this case. Put a small group of them in a busy court and the result can be a severe impairment of justice. This could happen more frequently than one might suspect, especially in low-level cases like the one before you. Did it happen here?

2. All prejudices cannot be outlawed, but could not precautionary due process measures be taken to insure that ordinary prejudices should not interfere with even-handed justice?

LIST OF INTERESTED PARTIES

1. James T. Walker

2. The Institute for Econometric Research

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637 F.Supp. 1297 (W.D. Mo. 1987) 13

STATEMENT OF JURISDICTION

The order sought to be reviewed is a final order of judgment issue by the Eleventh Circuit Court of Appeals on October 31, 1997.

Petitioner's Motion for Rehearing before the Eleventh Circuit was denied by order of that Court on January 30, 1998.

This Writ is filed under the jurisdiction conferred to the Court under Article III of the United States Constitution, 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner, Plaintiff below, filed an action against his former employer, The Institute for Econometric Research. ("The Institute"). The action arose from the Plaintiff's termination from employment at The Institute and was brought pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. Essentially, the claim focuses on the issue of whether Petitioner's release from employment was based solely on his age or was due solely to poor performance.

The District Court granted The Institute's motion for summary judgment. The Petitioner appealed to the Eleventh Circuit Court of Appeals and that Court affirmed the decision of the District Court. Petitioner filed a Motion for Rehearing before the Eleventh Circuit, but said motion was denied. Petitioner now files this Petition for Writ of Certiorari.

ARGUMENT

I. THE FACTS - Undisputed and indisputable. The Plaintiff was dismissed before work on the morning of June 17, 1992, on the basis of defendant's special report, printed the afternoon of June 16, 1992, showing poor performance by the plaintiff.

II. THE ISSUES - Undisputed and indisputable. It is simply whether the plaintiff's dismissal was based solely on his age, as plaintiff alleges; or based solely on plaintiff's poor sales performance, as defendant claims.

III. THE EVIDENCE - No new exhibits. A few old ones offering new and surprising insights. Exhibits include:

Defendant's personnel records indicating that, in the department where plaintiff was employed, average age for male employees was 26, as opposed to plaintiff's age (at that time) of 75. Exhibits B-1, B-2;

Two KEY exhibits that conflict: defendant's account of plaintiff's sales performance, (Exhibit C) and plaintiff's own record, (Exhibit D. Please note:—

plaintiff apologizes for a petition made bulky by including all 20 pages of this exhibit. Unfortunately, all previous excerpts or condensations were apparently overlooked.) Both C and D cover roughly the same time frame, but in other respects there is a marked difference. It becomes self-evident that only one of these records is valid. The importance of both, on which each party bases its main argument, also seems self-evident.

IV. CONTRAST BETWEEN THE TWO KEY EXHIBITS - Arguments not presented prior to the Summary Judgment ruling of the District Court, (September 1996).

1. Petitioner's Exhibit C is a 2-page computer printout called a Transaction Report. Produced at 2:58 p.m. on June 16, 1992; Plaintiff's Exhibit D is a handwritten day-by-day account of 20 pages, approx 5" x 8" (original available).

2. Exhibit C is based on input from one individual, the newly promoted sales director (formerly sales supervisor). Exhibit D gives the names of 104 individuals, scattered throughout the country. Phone numbers are frequent, as well as personal date useful for follow-up. (It was never intended as a scorecard.)

3. Exhibit C is a compilation of statistical data. It concludes showing an average sales figure for the plaintiff of minus $2.44 per hour. Exhibit D, based on specific sales, shows improving performance, exceeding $50.00 an hour Monday, June 15, 1992.

V. CREDIBILITY TEST, EXHIBIT C - For the first time this exhibit is shown in conjunction with relevant other exhibits to make significant points previously unrecognized. Please note: In all previous Motions, plaintiff naively assumed that a fair comparison of C and D would necessarily bestow credibility on D. Yet, time after time, the courts failed to agree with such a presumption. Therefore, this last opportunity to bring forth the truth merits a far more thorough scrutiny of C. Its importance is high-lighted by comments from the District Court's Summary Judgment, Petitioner's Exhibit A-1:

1. A grouping of factors relating to productivity.

a) <u>The minus $2.44</u>. "The Institute calculated productivity by subtracting $60.00 from the sales price of orders." (A-1 pg. 15)

b) <u>Quotas</u>. "The Institute required a minimum of $60.00 to $75.00 an hour." (A-1 pg. 15)

c) Never attained. "The Institute contends that Walker did not once reach the expected productivity and ...

d) No promise of improvement ... showed no promise of improvement". (A-1 pg. 15)

e) Testimony of Winfield, sales director (former supervisor). "Although Walker testified that the expected productivity was $50.00 an hour, based on his own calculations, he met that quota only once, two days before he was terminated." (Walker dep. 145). Winfield testified, however, that reaching the quota once during the probations period would not satisfy the Institute's productivity requirements. (Winfield dep. 11).

f) Significance of Winfield's Testimony. On the subject of quotas, it appears to be conceded that plaintiff did attain the desired quota, even if only once. There are also indications that the quota was $50.00, not $60.00 - $75.00. And there is not the slightest trace or hint of any subtractions or penalties. Also it is a matter of record that there is no mention of these negative factors in the 220 page sales manual, nor any place else in the defendant's sales literature.

g) Sales contests for improvement, and the double standard. Further, no sign of any $60.00 "adjustment" is evident in a sales contests Memorandum from Winfield on his first day as sales director, June 1, 1992. (Exhibit E) It is absent in such phrases as "average per sale" and "average dollar amount per sale". Yet there was a reliance on this factor as a cause for dismissal two and one half weeks later. Apparently, there was a double standard: one for his department, where the $60.00 factor is ignored; and one for a document for the special purpose of dismissal. (Incidental note: there was a general yardstick used to measure sales productivity. It was used in the sales manual and in all literature pertaining to sales and it also came to be used by Ms. Ciba and her successor. It was simple. Add up the sales regardless of type, and divide by number of hours worked.)

h) That harsh rules, steep quotas, intimidating threats and penalties should abound in the sales department, as portrayed by defendant, seems quite unrealistic. Telemarketing jobs were easy to get. (See Exhibit F) No normal human would put up with the unpleasant hassle which appears to be the policy claimed by defendant, to suit its purpose in this action.

2a) A new overview of a rushed dismissal.

June 1	Monday	Improvement contests announced Ex E
June 12	Friday	Plaintiff's best-yet sales of $46.00 an hour Ex D
June 15	Monday	Plaintiff's best-yet sales of $51.00 an hour Ex D
June 16	Tuesday	2:58 p.m. Defendant's Transaction Report Ex C
June 17	Wednesday	Plaintiff dismissed before work
June 21	Sunday	End of contest for most improvement Ex E

2b) A tale is in the timing.

1. The clear object of the director's contests was improvement.

2. Though off to a slow start (a handicap which was overcome) plaintiff's rate of improvement was exceeding the $10.00 an hour needed to qualify for the first contest. Thus the desired improvement was on record.

3. Yet, less than 24 hours following plaintiff's best day, the director was motivated to produce an unscheduled Transaction Report unfavorable to the plaintiff.

4. Less than 24 hours later he used it as grounds for dismissal.

5. Dismissal took place less than a week before the sales contest ended.

Note: aside from a defense counsel challenge, described below, all of the above facts pertaining to the abruptness of plaintiff's dismissal are undisputed and indisputable. See Local Rule 7.5, "... all material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement."

VI. CREDIBILITY TEST, PLAINTIFF'S EXHIBIT D - first noted June 1997.

1. Exhibit D challenged. The challenge came from the defense counsel on the occasion of his deposition of the plaintiff. Plaintiff happened to remark that his dismissal came just two days before attaining sales averaging $50.00 an hour. Defense counsel asked for proof. Accordingly, plaintiff original records were placed on the table while

counsel, keeping track on a yellow pad, together with the plaintiff toted up the sales for June 15. In a few minutes counsel proved, beyond all doubt, that plaintiff sales came to $51.65 an hour. Witnesses at the table included the defendant's president as well as its sales director.

2. It cannot get any more vulnerable than this. With its abundance of specific detail - names, phone numbers, transactions - Exhibit D "lets it all hang out". And it has done so since Day One. Any investigator, any reader of this document, is and always has been free to find even the slightest evidence of deliberate misrepresentation. Nothing has ever been added, subtracted or altered. Except for the skepticism of defense counsel, no one has ever disputed a word.

VII. SHOCKING INDIFFERENCE OF FEDERAL COURTS. PROOF POSITIVE.

With the proof squarely confronting them, showing one party telling the truth and the other twisting it, both Courts refused to see it. They looked the other way. And these are FEDERAL COURTS OF JUSTICE. Appalling and disgraceful.

To record here the massive evidence attesting to the indifference of both Courts would require several pages. Following are a few examples,

beginning with what appears to be a minor issue concerning telephone procedures such as establishing rapport. Three points will be made clear:

> defendant's distortion of simple facts;
> the Courts' readiness to accept the distortion and use it against plaintiff;
> the Courts' disregard of plaintiff's refuting the distortion.

1. Telephone procedures. Rapport. "Both Ciba and Winfield testified that they advised Walker that establishing rapport with the caller contravened the Institute's policies." (A-1 pgs. 16, 17). Criticism along these same lines also appears in A-2 pg. 4 or 6). For an example of plaintiff's efforts to refute the false allegation, which defendant has made often, please refer to Exhibits G-1, G-2 and G-3. They show repeated conspicuous use of defendant o w n materials. In vain.

2. Boosting and cross-selling. "Walker did not attempt to boost sales or to cross-sell". (A-1 pg. 16). Plaintiff's Exhibit D, not too carefully written and clearly not planned for its present usage, shows on most pages certain letters which represent the various publications. (ID - Investors Digest, etc.) After discussion with the caller, it would be agreed between caller and plaintiff that certain newsletters, of which the called had been unaware, could be of value. Arrangement was then made to send sample

copies. Such are examples of boosting and cross-selling, quite diligently pursued by plaintiff.

3. Statistical Evidence. "Walker testified that the Institute did not discriminate in its hiring process (Walker dep. 42, 163) ... and that he was unaware of discrimination against others". (Walker dep. 163). (A-1 pgs. 9, 10). Also: "Walker has failed to place his statistics in proper context". (A-1 pg. 9)
Concerning the above two excerpts, there is the defendant's plausible way of presenting its policies (clearly endorsed by the Court, bolstering its position with numerous citations); and there is the plaintiff's plausible way of presenting his side. At age 75, plaintiff was hired to join defendant's training program. But this argument, though compelling, should not end there. Plaintiff was hired by the founder and leader of a certain department that had its own rules. There is no other way to explain Exhibit B-1, in which defendant lists the names of every employee, also showing age and where employed. It is undisputedly true, as is Exhibit B-2. Thus, plaintiff, entering the department on his first day of employment, (and encountering the head supervisor for the first time) looked around and noted only one man whose hair was similar in color to his. And he was pushing a mail cart. Plaintiff's statement is in proper context. Fact: he exceeded the average age of all other males by 49 years. How could the District Court walk around a statistic like that? Citing numerous laws does not do it. Some

laws are used to implement justice, and others can be found to obstruct it.

VIII. CLOSING ARGUMENTS

Proving age discrimination. Defense counsel had to survive a rather humbling experience when, during deposition, his challenge of the plaintiff's sales served only to weaken his client's position and confirm the plaintiff's. Yet the plaintiff too had some awkward moments during that five and one half hour session. He alleged that, in the supervisor's first glance there was instant hostility and that subsequent events during the morning more than confirmed this impression. But how to describe a look, a tone of voice, what was said or left unsaid, done or not done? The more the plaintiff strove to be accurate and honest the more ludicrous he appeared. The plaintiff has had a fairly successful career in selling and as sales manager, but he is not Lawrence Olivier. Fortunately, the law takes into account that proving age discrimination poses exceptional problems. Evans v. American Nurses Ass'n, 637 F.Supp. 1297 (W.D. Mo. 1987). Extra consideration is given evidence that of necessity must be circumstantial. Herewith are examples:

1. There are positive clues in the District Court's Summary Judgment ruling which has been so heavily relied on by defendant, and apparently

accepted as valid by the Court of Appeals. Yet in all the lengthy arguments presented by the Court, ignored or slighted in the Ruling are such vital items as

- plaintiff's key Exhibit D. Not a word;
- the new director's sales contests, with their lack of any reference at all to the highly publicized $60.00 penalty. No, not a word;
- nothing about the strange timing of defendant's Exhibit C, though its minus $2.44 proved the basis for the claim of poor performance and for a rushed, next-day dismissal;
- nor anything at all about defendant's numerous allegations repeatedly being proved spurious, often by the use of defendant's own self-incriminating material.

All in all an inept, callous performance by a Federal Court that had forgotten about its noble mission to administer justice.

1a) Yet, a word on its behalf. When the ruling was made the Court, due to an unscrupulous defense, was confronted with many different issues, all weighted equally. The two key exhibits, mistakenly taken for granted by the plaintiff, actually were given less attention than minor ones. Issues such as procedures served to distract. Defense motions leading to the time of the ruling, and the defense motion for the ruling, were bulky, to say the least.

Outrageous lies, forgeries, the provable suborning of a witness all successfully served to obscure the truth. Further, the Court happened to be without a senior judge, happened to have a heavy caseload, and happened to be plagued by pro se scoundrels exploiting the system. (One no gooder had recently filed more than 70 lawsuits.) The Court indeed had its problems. And none favored the plaintiff.

2. Should a question about motive be considered irrelevant? Were the plaintiff before a jury he might personally suggest the simplest of options: let it decide that the plaintiff is either senile, dreaming of events that never happened, OR that he has devised a scheme to make money from an employer. But then, how to explain the letters protesting his dismissal? Plaintiff submits that there is no other choice. Except this: that he is honest in alleging that cause of dismissal was age, not performance, and that he is honest in every aspect of his supporting evidence.

REASONS FOR GRANTING PETITION

Nerve is required to bring before this highest of Courts one of the dullest of cases. And dull is only one of several negatives. All, as a certain grandson might say, are "turnoffs". They leave people disinterested or viewing with distaste. Thus, for the past several years, plaintiff's motions and rebuttals, arguments and evidence, have largely been ignored; while a clever defense strategy - loading on numerous issues to obscure the truth of the main one - along with blatant distortion of facts, has been winning all the points. Early on, the accepted and usual course of judicial proceedings was abandoned. There has been no fair evaluation of the position of both parties. No such thing as even-handed justice. Plaintiff's last hope of finding it is here. He can only ask: Please. Do not be turned off too quickly.

An ordinary age discrimination case - and plaintiff's is very ordinary - does not rivet the attention. Goes to the bottom of the heap in interest and concern. To the above, add an ignoble pay of $6.00 an hour. And then there is the job itself: telemarketing! A national plague. And there is more. Low pay and the limitations imposed by law make for a non-lucrative situation for attorneys. None in plaintiff's area could be found to help. Thus he was forced to act pro se - an error prone breed not highly regarded by any court struggling with a caseload.

The matter of significance. There is no issue to be decided here. Only a situation that needs correcting. An ordinary person who had been wronged is being wronged again by the nation's Courts. What happened to the plaintiff surely may happen to others. Thus the present situation would seem to merit investigation and correction. And even if there were only one person out there who has been mistreated, the ideal of "justice for all" seems too noble to be abandoned.

A parting hope. No, a dream. Perhaps this final and oft-repeated appeal to consider the evidence will again fail. Unwilling to confront such a thought, plaintiff seeks solace in a dream about what this Petition and long-fought case might somehow accomplish:

> Could it perhaps send a message to the over-vigilant Senator Hatch? As chairman of the Judiciary Committee he is causing serious problems not only for Federal Courts, many of which are short-handed, but also for those turning to the Courts for justice.
>
> Could it perhaps prompt a memo to all Federal Court personnel that even the most tiresome low-level cases warrant impartial consideration of evidence? Plaintiff claims that he has worked with juvenile delinquents who seemed to have a better sense of right and

wrong.

And could the details of this case somehow motivate the legislature to take a closer look at the ADEA? As is stands now, ironically, it provides protection for the employer, not the employee. With millions of oldsters rejoining the work force, punitive damages for excessive malice should be available. It would help a wronged, low-pay employee get professional help, and it would therefore serve to deter wrongdoing by an employer.

Only a dream. But cherished.

APPENDIX

Exhibits A1, A2 & A3	Lower Court Orders (District Court Judgment) (Appeals Court Rejection) (Appeals Court Denial of Rehearing)
Exhibit B1 & B2	Personnel Records
Exhibit C	Defendant's Sales Records
Exhibit D	Plaintiff's Sales Records
Exhibit E	Memo About Contests
Exhibit F	Classified Advertisements
Exhibit G1, G2 & G3	Self-incrimination